FILE COPY

Supreme Court, U.S.
FILED
SEP 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

v.

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM OR DISMISS

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

Attorneys for Appellees

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement 3

Introduction 3

Proceedings during 1969-70 before a Single District Judge 4

Obstruction of the District Court Orders; Convening of Three-Judge Court 6

ARGUMENT—

I. The Case Presents No Substantial Questions Not Previously Decided by This Court 11

A. This Court Decided in 1809 in *United States* v. *Peters* That State Legislatures Could Not Validly Annul Federal Court Judgments 11

B. This Court Decided in *Green* v. *County School Board of New Kent County* That School Boards Must Take Affirmative Action to Disestablish Dual Segregated School Systems 16

II. The Appeal Should Be Dismissed Because the Case Was Not Required to Be Heard by a Three-Judge Court 17

PAGE

A. The Case Involved Primarily a Supremacy Clause Issue and Thus no Three-Judge Court Was Required Under the Doctrine of *Swift & Co.* v. *Wickham* 17

B. The Anti-Bussing Law Is So Obviously Unconstitutional That no Three-Judge Court Was Required 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Bailey v. Patterson, 369 U.S. 31 (1962) 3, 10, 18
Brown v. Board of Education, 349 U.S. 294 (1955) 12
Brown v. Board of Education, 347 U.S. 483 (1954) 12, 19
Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D. S.C. 1968), judgment affirmed, 393 U.S. 222 (1968) 13
Bryant v. State Board of Assessment, 293 F. Supp. 1379 (E.D. N.C. 1968) 15
Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La. 1961), judgment affirmed, sub nom. Tugwell v. Bush, 367 U.S. 907 (1961) and Gremillion v. United States, 368 U.S. 11 (1961) 13
Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961), judgment affirmed, sub nom. Legislature of Louisiana v. United States, 367 U.S. 907 (1961) and Denny v. Bush, 367 U.S. 908 (1961) 13
Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La. 1960), judgment affirmed, New Orleans v. Bush, 366 U.S. 212 (1961) 12

PAGE

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960), stay denied sub nom. United States v. Louisiana, 364 U.S. 500 (1960), judgment affirmed, 365 U.S. 569 (1961) 12, 14

Bush v. Orleans Parish School Board, 187 F. Supp. 42 (E.D. La. 1960), stay denied, 364 U.S. 803, judgment affirmed, Orleans Parish School Board v. Bush, 365 U.S. 569 (1961) 12, 14

Cooper v. Aaron, 358 U.S. 1 (1958) 12, 16

Ex parte Poresky, 290 U.S. 30 (1933) 18

Faubus v. United States, 254 F.2d 797 (8th Cir. 1958), cert. denied, 358 U.S. 829 15

Godwin v. Johnston County Board of Education, 301 F. Supp. 339 (E.D. N.C. 1969) 15

Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 16, 18

Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), judgment affirmed, 368 U.S. 515 (1961) 13

Harvest v. Board of Public Instruction of Manatee County, 312 F. Supp. 269 (M.D. Fla. 1970) 15

Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), affirmed sub nom. Wallace v. United States, 389 U.S. 215 (1967) 13, 15

Louisiana Education Commission for Needy Children v. U. S. District Court, 390 U.S. 939 (1968) 13

Marbury v. Madison, (US) 1 Cranch 137 16

Meredith v. Fair, 328 F.2d 586 (5th Cir. 1962) 15

PAGE

Mitchell v. Donovan, 398 U.S. 427 (1970) 10
Moore v. Charlotte-Mecklenburg Board of Education, No. 444, O.T. 1970 3
Moore v. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503 (W.D. N.C. 1970) 1, 8

Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), judgment affirmed, 389 U.S. 571 (1968) 13
Poindexter v. Louisiana Financial Assistance Commission, 296 F. Supp. 686 (E.D. La. 1968), judgment affirmed, sub nom. Louisiana Education Commission for Needy Children v. Poindexter, 393 U.S. 17 (1968) 13

Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970) 10

Sterling v. Constantin, 287 U.S. 378 (1932) 15
Swann v. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503 (W.D. N.C. 1970) 1
Swann v. Charlotte-Mecklenburg Board of Education, No. 281, O.T. 1970 ..... 3, 4, 5
Swann v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970) 4
Swift & Co. v. Wickham, 382 U.S. 111 (1965) 3, 10, 17

Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958) 15
Turner v. Memphis, 369 U.S. 350 (1962) 18

United States v. Peters, (US) 5 Cranch 115, 3 L.Ed. 53 11
United States v. Wallace, 222 F. Supp. 485 (M.D. Ala. 1963) 15

Statutes: PAGE

Constitution of the U. S., Article VI, Supremacy Clause 2, 10

28 U.S.C. §1253 ..... 2, 4, 17

28 U.S.C. §2281 ..... 5, 10, 17

28 U.S.C. §2283 14

28 U.S.C. §2284 5

N.C. Gen. Stat. §115-176.1 ..... 2, 3, 7, 10, 11, 16

Other Authorities:

1A Moore's Federal Practice 14

Rule 16, Rules of the Supreme Court of the United States 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

v.

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that it is manifest that the questions are so unsubstantial as not to warrant further argument, or, in the alternative, to dismiss the appeal herein on the ground that it is not within the jurisdiction of the Court.

Opinions Below

The opinion of the three-judge district court is reported as *Swann* v. *Charlotte-Mecklenburg Board of Education* (also *Moore* v. *Charlotte-Mecklenburg Board of Education*), 312 F. Supp. 503 (W.D. N.C. 1970).

Jurisdiction

Appellees submit that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case is not a "civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Appellees' argument in support of the contention that a three-judge court was not required appears *infra* in Argument II.

Questions Presented

1. Whether the judgment below may be affirmed on the ground that N.C. Gen. Stat. §115-176.1 was an unconstitutional legislative attempt to nullify rights of the appellees under a prior judgment of a United States District Court, and that the state statute thus violates the Supremacy Clause of Article VI of the Constitution of the United States.

2. Whether the court below was correct in determining that portions of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, are unconstitutional because they interfere with a school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment to eliminate racial segregation in the public schools.

3. Whether the appeal should be dismissed on the ground that no direct appeal from the district court is provided where the case was not one required to be heard by a district court of three judges since:

(a) the case involves an issue under the Supremacy Clause (the conflict of a state law with a prior federal

court order) and thus no three-judge court is required under the doctrine of *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); and

(b) numerous prior decisions of this Court make it plain that the statute is unconstitutional and thus no three-judge court is required under the doctrine of *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Statement

Introduction

This is a direct appeal by the North Carolina State Board of Education and a group of state officials[1] from the order of a three-judge district court ruling that a portion of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, was unconstitutional because it interfered with the affirmative duty of local school boards under the Fourteenth Amendment to desegregate the public schools. A companion appeal involving the same judgment is also pending here as No. 444, O.T. 1970, *sub nom. Moore* v. *Charlotte-Mecklenburg Board of Education*. The proceeding in the three-judge court was an ancillary proceeding connected with the school desegregation case involving Charlotte-Mecklenburg which is also now pending here as *Swann* v. *Charlotte-Mecklenburg Board of Education*, O.T. 1970, No. 281, certiorari granted June 29, 1970.

This direct appeal is in an unusual posture in that it has been scheduled for argument and briefing, prior to any action by the Court on the Jurisdictional Statement. (Order of the Chief Justice herein dated August 31, 1970.) Not-

[1] Appellants herein include the State Superintendent of Public Instruction, the Governor of North Carolina, the Controller of the State Board of Education, and a judge of the Superior Court of Mecklenburg County who issued an order allegedly interfering with the federal court desegregation orders.

withstanding this action, appellees believe it appropriate to file this response to the Jurisdictional Statement because we believe the case involves no substantial issues not previously decided by the Court and because we doubt that the necessary jurisdictional requisites for direct appeal are present under 28 U.S.C. §1253.

Proceedings during 1969-70 before a Single District Judge

The school desegregation case brought by Negro pupils and parents against the Charlotte-Mecklenburg Board of Education was commenced in 1965 and there has been extensive litigation ever since which has culminated in the *Swann* case now pending in this Court. A full statement of the history of the proceedings from 1965 to date is contained in Petitioners' Brief in *Swann*, No. 281, O.T. 1970. The case has resulted in numerous reported decisions which are cited in the note below.[2]

On April 23, 1969, after a plenary hearing, the district judge rendered a decision and order finding that the school system was still unlawfully segregated and directing that that defendants file a plan for complete desegregation of the system (*Swann, supra*, 300 F. Supp. 1358). The court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, transportation or bussing of students and any other method which would effectuate a racially unitary system. Extensive litigation ensued as the board submitted a series of proposals and the court rejected them as unsatisfactory to disestablish the segregated system. In the midst of this

[2] See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D. N.C. 1965), *affirmed*, 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970).

litigation about the remedy to implement the April 23 decision, the North Carolina legislature enacted the anti-bussing bill proposed by a member of the Mecklenburg delegation. The measure which was ratified July 2, 1969, included the following two sentences (later held unconstitutional):

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

Plaintiffs in the *Swann* case promptly obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the above-quoted portion of the anti-bussing law; they asked that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284 (App. No. 281, pp. 460a-479a). However, no three-judge court was convened at that time and the court took no action on the requests for relief because the school board thought that the anti-bussing law did not interfere with the school board's proposed plan to bus about 4,000 black children to white suburban schools (306 F. Supp. at 1295).

After further hearings to consider the board's further proposals during the fall of 1969 and the operation of the interim plan (which involved bussing black children to formerly white schools), the district court finally directed that a plan be prepared by the court's expert consultant. The court consultant's plan was ordered into effect in an order entered February 5, 1970, reported at 311 F. Supp. 265. The February 5 order provides for the alteration of some school attendance areas, the creation of certain "satellite" or non-contiguous zones from which pupils would be transported to school, the pairing and clustering of certain

schools with the alteration of grade structures, and transportation for pupils who live more than walking distance (as determined by the board) from the school to which they are assigned. The pairing and clustering of 10 black and 24 white elementary schools will result in pupils of both races being transported to schools which were formerly segregated. The district court made extensive supplemental findings about the amount of transportation required and its relation to the large school bus transportation system which was already in operation in the community (App. No. 281, p. 1198a).

Obstruction of the District Court Orders; Convening of Three-Judge Court

Following the order of February 5, 1970, numerous citizens, under the banner of "Concerned Parents Association," held meetings to protest the order, vowing to defy, delay, obstruct and in any way prevent its implementation. On January 30, 1970, they filed a proceeding in the Mecklenburg County Superior Court (*Harris* v. *Self*) and obtained an *ex parte* temporary restraining order, purportedly preventing the superintendent from paying the fees and expenses of the court consultant as directed on December 2, 1969. They filed an amended complaint on February 12, 1970, in the Mecklenburg County Superior Court and obtained an amended temporary restraining order which enjoined the Charlotte-Mecklenburg Board of Education from expending any money for the purpose of purchasing or renting any motor vehicle or operating or maintaining such for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg school system from one school to another and from one district to another. The order entered by the Mecklenburg Superior Court on January 30, 1970, was modified to permit payment of the court consultant on approval of the Board of Education.

On February 11, 1970, Governor Robert W. Scott issued a public statement to the effect that North Carolina General Statute §115-176.1 prohibited the involuntary bussing of students, that he had taken an oath to uphold the laws of the State of North Carolina, and that he was directing all officials to enforce this statute. On February 12, 1970, Governor Scott instructed the Director of the Department of Administration that "use of public funds for providing bus transportation shall be strictly in accordance with the appropriations made by the 1969 General Assembly, and for no other purpose. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins" (sic.). Copies of the letter were forwarded to Dr. A. Craig Phillips, the Superintendent of Public Instruction; Dr. Dallas Herring, Chairman of the State Board of Education; Mr. A. C. Davis, the Controller of the State Board of Education; and Mr. Tom White, Chairman of the State Advisory Budget Commission. Shortly thereafter, Dr. A. Craig Phillips issued a similar statement and further advised that he was opposed to bussing. On February 23, 1970, he wrote to Dr. William S. Self, Superintendent of the Charlotte-Mecklenburg Schools and advised, "No additional State funds will be allocated to the Charlotte-Mecklenburg Board of Education to provide bussing of students for the purpose of creating a balance or ratio of students in the schools." On the same date, Mr. A. C. Davis directed a memorandum to the superintendent of each local school system in the State advising that the General Assembly had appropriated funds for the operation of 9,510 buses during the 1969-70 school year and 9,635 buses during the 1970-71 school year. The memorandum advised that approximately 9,443 buses were presently in use and that, "The appropriation does not include funds for the transportation of

thousands of additional students and the operating costs of hundreds of additional buses which might be made necessary by the reorganization of schools. No additional State funds will be allocated to school administrative units to provide bussing of students for the purpose of creating a balance or ratio of students in schools."

On February 13, 1970, plaintiffs moved the court (App. No. 281, p. 840a) to add as additional parties-defendant the Governor of the State; Mr. A. C. Davis, Controller of the State Board of Education; the Honorable William K. McLean, the Superior Court Judge who issued the temporary restraining order, each plaintiff in the Superior Court proceeding and their attorney. Plaintiffs also asked the court to add as additional parties-defendant the Honorable James Carson who initially proposed the statute here in question and who had made several public statements of his intention to file a proceeding in the state court to enjoin the school board from complying with the February 5, 1970, order of the court. Plaintiffs further sought an injunction against the enforcement of the state court restraining order as modified on February 12, 1970, and to enjoin the defendants from further interference with the implementation of the orders of the district court.

On February 20, 1970, the resident district judge entered an order reciting the various events and requesting that the Chief Judge of the Circuit designate a three-judge district court (App. No. 281, p. 845a). A three-judge court was designated on February 24, 1970, and additional parties were added by order of February 25, 1970 (App. No. 281, p. 901a).

Meanwhile, on Sunday night, February 22, 1970, approximately 50 adults on behalf of themselves and their children filed another proceeding (*Moore* v. *Charlotte-Mecklenburg Board of Education*) in the Mecklenburg County Superior

Court seeking to restrain desegregation of the Charlotte-Mecklenburg schools as directed by the district court. At 10:16 p.m. on that Sunday night, the Honorable Frank Snepp issued an *ex parte* temporary restraining order enjoining the Charlotte-Mecklenburg Board of Education and its Superintendent

> from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color.

On Thursday, February 26, 1970, the board removed the *Moore* case to the United States District Court. At a special meeting of the board on Friday, February 27, 1970, the board chose to comply with the order of the state court rather than the orders of the federal district court. The Superintendent announced that all planning and activities then underway for implementation of the district court's order of February 5, 1970, were terminated. On the same date, plaintiffs moved the court to add the plaintiffs in the *Moore* case, their lawyers and the Honorable Frank Snepp as additional parties-defendant in this case. Plaintiffs further sought an order enjoining the enforcement of the state court order and enjoining any further efforts by all of the defendants from taking steps which would prevent or inhibit the implementation of the orders of the district court. Plaintiffs also sought an order finding all members of the Charlotte-Mecklenburg Board of Education and its Superintendent in contempt and imposing a fine or imprisonment for each day that the defendants failed to comply with the court's orders.

The district court on March 6, 1970, entered an order decreeing that the order by Superior Court Judge Snepp in the *Moore* case "is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970" (App. No. 281, pp. 925a-927a). The three-judge court eventually ruled in an opinion dated April 28, 1970, that the challenged portions of the anti-bussing law were unconstitutional in violation of the equal protection clause of the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution (312 F. Supp. 503, 510). The initial opinion denied injunctive relief and granted only a declaratory judgment. However, this portion of the original opinion was withdrawn[3] and the court enjoined all of the parties in the *Swann* and *Moore* cases from "enforcing, or seeking the enforcement of" the unconstitutional portion of N.C. Gen. Stat. 115-176.1.

Although plaintiffs Swann, et al. originally sought a three-judge court, they subsequently urged upon the district court that it was empowered to act on the matter as a single judge and that a three-judge court was not required by 28 U.S.C. §2281 because of the doctrine of *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), and *Bailey* v. *Patterson*, 369 U.S. 31 (1962). The three-judge court rejected these arguments that a three-judge court was not required.[4] (312 F. Supp. 503, 507.)

---

[3] The three-judge court determined to grant an injunction rather than merely a declaratory judgment after taking note of this Court's decisions in *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), and *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

[4] The court below said that it rejected "plaintiffs' attack upon our jurisdiction" (312 F. Supp. at 507). However, plaintiffs, by a brief filed in the trial court sought to make clear that their argument that a single judge might properly have disposed of the case was not a denial that the three-judge district court had *jurisdiction* over the matter, but only an argument that three judges were not required to decide the case under 28 U.S.C. §2281.

ARGUMENT

I.

The Case Presents No Substantial Questions Not Previously Decided by This Court.

A. This Court Decided in 1809 in *United States* v. *Peters* That State Legislatures Could Not Validly Annul Federal Court Judgments

It is manifest that the challenged provisions of the anti-bussing law, which forbid the consideration of race in the assignment of pupils, and forbid their being "involuntarily bussed" attempt to nullify the April 23, 1969, order of the United States District Court requiring the desegregation of the public schools in the Charlotte-Mecklenburg system. The anti-bussing law is a bald attempt to legislatively repeal the judgment of a court of the United States deciding rights of litigants under the Constitution and laws of the United States. The district court order required, *inter alia*, the implementation of plans to reassign pupils so as to eliminate racially segregated schools and the consideration of the use of transportation facilities to effect that purpose. The effect of N.C. Gen. Stat. §115-176.1 is to forbid the school board from engaging in affirmative steps to bring about racial integration of the schools and eliminate the dual system established under the compulsion of state segregation laws.

This Court unanimously rejected such an assertion of state power to set aside a federal court decree in an historic opinion by Chief Justice John Marshall delivered on February 20, 1809, and such assertions have been emphatically rejected ever since. In *United States* v. *Peters*, (US) 5 Cranch 115, 136, 3 L.Ed. 53, 59, it was stated:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

In recent years there have been a number of attempts by state officials to nullify decrees of the federal courts requiring implementation of this Court's decisions in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Brown* v. *Board of Education,* 349 U.S. 294 (1955). The most serious such attempt prompted a unanimous opinion of all the Justices of the Court in 1958 in *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958): "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

Ever since *Cooper* v. *Aaron,* the Court has disposed of similar contentions in *per curiam* decisions nullifying efforts at legislative interposition and nullification of desegregation decrees of the lower federal courts. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *stay denied,* 364 U.S. 803, *judgment affirmed, Orleans Parish School Board* v. *Bush,* 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (E.D. La. 1960; three-judge court), *stay denied, sub nom. United States* v. *Louisiana,* 364 U.S. 500 (1960), *judgment affirmed,* 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La. 1960; three-judge court), *judgment affirmed, New Orleans*

v. *Bush*, 366 U.S. 212 (1961); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Legislature of Louisana* v. *United States*, 367 U.S. 907 (1961) and *Denny* v. *Bush*, 367 U.S. 908 (1961); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Tugwell* v. *Bush*, 367 U.S. 907 (1961) and *Gremillion v. United States*, 368 U.S. 11 (1961); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961; three-judge court), *judgment affirmed*, 368 U.S. 515 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967; three-judge court), *judgment affirmed*, 389 U.S. 571 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La. 1968; three-judge court), *judgment affirmed, sub nom. Louisiana Education Commission for Needy Children* v. *Poindexter*, 393 U.S. 17 (1968); *Louisiana Education Commission for Needy Children* v. *U. S. District Court*, 390 U.S. 939 (1968) (prohibition denied); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968; three-judge court), *judgment affirmed*, 393 U.S. 222 (1968).

The decisions of the district court in this case to require the further desegregation of the schools and to require the use of bussing and other techniques were of course not final until appropriate appeals were exhausted. But rather than resorting to appeals in due course, the state officials in North Carolina engaged in discreditable attempts to review and nullify the judgments of the district court by resort to state legislative, executive and judicial actions. These assertions of power were sought to be justified by arguments that decisions of the district court need not be

obeyed and were not lawful until upheld by this Court. Such a premise must be emphatically rejected, as it was in the *Bush* case:

> From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another consequence of equal importance results. It is that the jurisdiction of the *lower* federal courts and the correctness of their decisions on constitutional questions cannot be reviewed by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative constitutional tribunal, neither the executive, nor the legislature, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed. Assuredly, this is a great power, but a necessary one. See United States v. Peters, supra, 5 Cranch 135, 136, 9 U.S. 135, 136. (*Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916, 925 (E.D. La. 1960).)

The power of the federal district court to stay state court proceedings where necessary to "protect or effectuate its judgments" against threatened relitigation in state courts is conferred by 28 U.S.C. §2283. See 1A Moore's Federal Practice, 2319-2320, 2614-2616. Such orders restraining conflicting state court proceedings have been issued in a number of school desegregation cases. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *affirmed,* 365 U.S. 569 (1961) (both the litigants and state judge were enjoined in *Bush*);

Thomason v. *Cooper,* 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962; *en banc*).

Nor does it matter that one of the state officers involved is the Governor of the State, for governors are in no different position than other state officials in terms of their duty to obey federal court judgments. *Sterling* v. *Constantin,* 287 U.S. 378, 393 (1932); *Faubus* v. *United States,* 254 F.2d 797 (8th Cir. 1958), *cert. den.* 358 U.S. 829; *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962); *United States* v. *Wallace,* 222 F. Supp. 485 (M.D. Ala. 1963); *Harvest* v. *Board of Public Instruction of Manatee County,* 312 F. Supp. 269 (M.D. Fla. 1970).

The appellants' argument that the State Board of Education, Superintendent of Public Instruction and other state officers are not properly named as defendants is plainly without merit for it was undisputed that they threatened to interfere with implementation of the desegregation order in Charlotte in reliance upon the anti-bussing law. Furthermore, these state officials share the affirmative duty to bring about desegregation of the schools with local officials. *Godwin* v. *Johnston County Board of Education,* 301 F. Supp. 339 (E.D. N.C. 1969); *Bryant* v. *State Board of Assessment,* 293 F. Supp. 1379 (E.D. N.C. 1968; three-judge court); *cf. Lee* v. *Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom. Wallace* v. *United States,* 389 U.S. 215 (1967) (a state-wide school desegregation suit).

The anti-bussing law stands on no different footing than the previous attempts to nullify the desegregation orders of federal courts revealed in the cases cited above. The efforts of state executive, legislative and judicial officers to annul the judgments of the United States District Court for the Western District of North Carolina in the Charlotte-Mecklenburg school case must be emphatically re-

pudiated. As this Court made clear in *Cooper* v. *Aaron*, 358 U.S. 1, 17-19, it has been clearly settled law since *Marbury* v. *Madison* (US) 1 Cranch 137, 177 that the "federal judiciary is supreme in the exposition of the law of the Constitution." The efforts of state officers in this case to nullify the desegregation decrees merit no serious consideration by this Court. Those actions were plainly blameworthy and discreditable, and the district court was, if anything, too mild in not issuing contempt citations or condemning the obstructions of its orders in more explicit terms. Although the cause has been set for oral argument in this Court, we suggest that the case does not merit such further consideration.

B. This Court Decided in *Green* v. *County School Board of New Kent County* That School Boards Must Take Affirmative Action to Disestablish Dual Segregated School Systems

Section 115-176.1 is an attempt to prevent North Carolina school boards from performing their constitutional duty to desegregate the public schools. Under *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968), the school boards throughout the State of North Carolina are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." It is entirely obvious, that as the court below held, school boards cannot effectively eliminate racial segregation of pupils without considering the race of pupils when planning new assignments. It is also obvious that they must use the conventional tools of school administration, including school bus systems, to convert to unitary nonsegregated systems. Section 115-176.1 attempts to severely disable North Carolina school officials in dealing with state imposed racial segregation. As the court below wrote:

> A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. (312 F. Supp. 503, 509-510.)

The decision of the district court holding that the anti-bussing law violates the equal protection clause is plainly correct for the reasons stated in the opinion below (312 F. Supp. 503, 507-510). The judgment below should be summarily affirmed.

II.

The Appeal Should Be Dismissed Because the Case Was Not Required to Be Heard by a Three-Judge Court.

A. The Case Involved Primarily a Supremacy Clause Issue and Thus no Three-Judge Court Was Required Under the Doctrine of *Swift & Co.* v. *Wickham*

It is submitted that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. § 1253 because the case is not one *required* by any Act of Congress to be heard by a three-judge district court. In *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), the Court held that 28 U.S.C. section 2281 did not require that a three-judge court be convened to decide a claim based on the Supremacy Clause of the Constitution that a state law was invalid because it conflicted with an Act of Congress. We think that there is no sound reason not to apply the *Swift* doctrine and reach the same result in a case such as this where a state law is alleged to be invalid under the Supremacy Clause because it conflicts with the judgment of a court of the United States. We believe that the same considerations relating to the efficient operation of the

lower federal courts which were held dispositive in cases where a state statute must be compared for conflict with a federal statute apply equally where the comparison must be made between the statute and the decrees of a federal court.

In the circumstances of the Charlotte case a federal district judge was faced with a series of orders by state judges purporting to rely upon a newly enacted state law to forbid that which the district judge's decisions had commanded to be done. Similarly, state executive officers, defendants in the case, threatened to defy the federal court orders in reliance upon the state law. In such a situation the power of the single federal district judge to protect his own orders should be entirely clear. There should be no need to resort to a three-judge court to put down blatant defiance of a district judge's orders by state officials.

B. The Anti-Bussing Law Is So Obviously Unconstitutional That no Three-Judge Court Was Required

In *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962), this Court held that when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." See also *Turner* v. *Memphis,* 369 U.S. 350, 353 (1962); *cf. Ex parte Poresky,* 290 U.S. 30 (1933). We believe that these principles apply in this case. For the reasons stated by the court below in its opinion the challenged portions of the anti-bussing law are plainly in conflict with this Court's decision in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968). This conflict was open and obvious. Indeed, it was plainly intended. The state legislature sought to insulate a freedom of choice basis for desegregation from federal court attack notwithstanding this Court's decision that free choice plans may be constitutionally inadequate. The legislature openly sought to prevent the school board from taking effective action

to disestablish the dual system. A three-judge court should not be required to deal with such a patent evasion of the *Brown* decision after sixteen years of such experimentation with disobedience. Efforts to obstruct *Brown* should be dealt with in the most efficient manner possible without the necessity of convening three-judge courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, or, in the alternative, that the appeal should be dismissed.

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

Attorneys for Appellees